FILE COPY

FILED
APR 9 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1133

LOUISE C. BENNION,
Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT NEW YORK LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE A. CRITCHLOW,
Salt Lake City, Utah;
EDWIN BORCHARD,
New Haven, Conn.,
Attorneys for Respondent.

RONALD B. SWINFORD,
HARRY J. McCALLION,
New York City,
Of Counsel.

INDEX

	PAGE
STATEMENT	1
A. The Policy	1
B. Death of the Insured	2
C. Payment by the Company	3
PRIOR PROCEEDINGS	3
A. State Court	3
B. United States District Court	3
C. Circuit Court of Appeals	4
RESPONDENT'S CONTENTIONS	4
POINTS:	
POINT I—There are no factors present in this case to warrant the granting of the writ	5
A. The decision herein of the Circuit Court of Appeals, Tenth Circuit, is not in conflict with the decisions of any other Circuit Court	5
B. The Circuit Court of Appeals, Tenth Circuit, has not decided an important question of local law herein in any way probably in conflict with applicable local decisions	6
C. No important question of Federal Law is involved in this case	7
D. The Circuit Court of Appeals, Tenth Circuit, has neither departed from the accepted and usual course of judicial procedure nor sanctioned any such departure by the District Court herein	9

PAGE

POINT II—The Circuit Court of Appeals correctly decided the issues in this case in favor of respondent 9

A. The attack upon Pearl Harbor was "war" within the plain meaning of the policy 10

1. The contract must be construed fairly, reasonably and in accord with common sense 10

2. The term "war" is unambiguous 13

3. The defense against the Japanese Attack was authorized by the Government of the United States 18

4. The Political Department of our Government has determined that Pearl Harbor was "war" 20

5. The Japanese Government declared that war had begun at dawn on December 7, 1941 24

B. War may exist without a formal declaration thereof 24

1. A declaration of war by Congress is unnecessary 24

2. A State may be at war without any declaration by Congress 27

3. A formal declaration of war is the exception rather than the rule 28

C. Decisions to the contrary are unsound 29

D. The Virginia statute is not in point 31

CONCLUSION 31

EXHIBIT A 33

CASES CITED

	PAGE
Anderson vs. *Great Eastern Casualty Company,* 51 Utah 78, 168 Pac. 966	7
Arce v. *State,* 80 Tex. Crim. App. 331, 202 S. W. 951	28
Bas v. *Tingy,* 4 Dallas 37, 1 L. Ed. 731	14, 16
Bergholm vs. *Peoria Life Insurance Company,* 284 U. S. 489, 76 L. Ed. 416, 492	7, 10
Browning v. *Equitable Life Assurance Society,* 94 Utah 532, 543, 72 Pac. (2d) 1060	6
Darden v. *North American Benefit Association,* 170 Va. 479, 197 S. E. 413	7, 11, 31
Dole v. *Merchants' Mutual Marine Insurance Co.,* 51 Maine 465, 470	25, 28
Dole v. *New England Mutual Marine Insurance Co.,* 6 Allen 373 (Mass.)	12
Duncan v. *Kahanamoku,* 327 U. S. 304	21
Eliza Ann, 1 Dodson 244 at 247	27, 29
Gressler v. *New York Life Insurance Company,* 163 Pac. (2d) 324; 156 P. 2d 212 (Utah; not officially reported)	6, 7
Hamilton v. *McClaughry* (C. C. Kans.), 136 Fed. 445, 449	24, 26, 28
Imperial Fire Insurance Co. v. *Coos County,* 151 U. S. 452, 462, 38 L. Ed. 231, 235	7, 10
In re Wulzen (E. D. Ohio), 235 Fed. 362, 365	24
Kawasaki Kisen Kabushika Kaisya v. *Bantham Steamship Co.,* 63 Lloyds List Law Reports 155 (1939)	28
LaRue v. *Kansas Mutual Life Ins. Co.,* 68 Kans. 539, 75 Pac. 494	28
Luther v. *Borden,* 7 How. 1, 45	16

PAGE

Maryland Casualty Co. v. *Morrison,* 151 Fed. 2d, 772 (C. C. A. 10th) 12

New England Mutual Life Insurance Co. v. *Mitchell,* 118 Fed. (2d) 114 (C. C. A. 4th) 31

Pang v. *Sun Life Assurance Co.,* 37 Hawaii 208 29
Portsmouth Insurance Company v. *Reynolds,* 32 Gratt. 613 (Va. 1880) 13
Prize cases 2 Black 635 ..... 16, 25

Rosenau v. *Idaho Mutual Benefit Assn.,* 65 Idaho 408, 145 Pac. (2d) 227 29
Ruhlin v. *New York Life Insurance Co.,* 304 U. S. 202, 206; 82 L. Ed. 1290, 1292 6

Savage v. *Sun Life Assurance Co.,* 57 Fed. Supp. 620 .....5, 29, 30
Stankus v. *New York Life Insurance Company,* 312 Mass. 366; 44 N. E. 2, 687 14
Sutton v. *Tiller,* 6 Cold (Tenn.) 593, 98 Am. Dec. 471 24

The Pedro, 175 U. S. 354, 44 L. Ed. 195 28

United States v. *One Hundred Twenty Nine Packages,* 27 Fed. Cas. No. 15941 24
U. S. F. & G. Company v. *Guenther,* 281 U. S. 34, 37; 74 L. Ed. 683, 685 ..... 12, 15
United States Mutual Accident Association v. *Newman,* 84 Va. 52, 3 S. E. 805 ..... 7, 11

Vanderbilt v. *Travelers Life Ins. Co.,* 112 Misc. 248, 184 N. Y. Supp. 54 (affirmed 235 N. Y. 514, 139 N. E. 715) 29
Verano v. *de Angelis Coal Co.* (M. D. Pa.), 41 Fed. Supp. 954 24

Welborn v. *Wyatt,* 175 Va. 163, 7 S. E. 2d., 99 11
Williams vs. *Union Central Life Insurance Company,* 291 U. S. 170, 78 L. Ed. 711 ..... 7, 10

Statutes

	PAGE
Virginia Code, 1924:	
Section 4228a	3
Alien Enemy Act:	
Sec. 21 Title 50 U. S. C. A.	20
Constitution of the United States:	
Article I, Sec. 10	27

Miscellaneous

Funk & Wagnalls New Standard Dictionary	15
Murray's Oxford Dictionary	16
The Control of Foreign Relations by Quincy Wright, Presented by John Bassett Moore, Collected Papers, Vol. V, p. 195	16, 26, 27
Public Papers for 1940; pp. 228, 464, 540	20
Proc. #2525; Fed. Register Dec. 10, 1941, p. 6321; 55 Stat. pt. II, 1700	20–21
Congressional Record, Vol. 87, Part 9, pp. 9504-05	21
Public Law 328, 77th Cong. 1st Session (55 Stat. 795)	21
Mustering Out Payment Act of 1944 (58 Stat. 8)	22
Public Law 144, Chapter 233 78th Congress, 1st Session (57 Stat. 556)	22
Public Law 10, Chapter 16, 78th Congress, 1st Session (57 Stat. 21)	22
Public Law 16, Chapter 22, 78th Congress, 1st Session (57 Stat. 43)	22
Public Law 52, Chapter 96, 78th Congress, 1st Session (57 Stat. 81)	22
Public Law 767, Chapter 633 77th Congress, 2d Session (56 Stat. 1012)	22
Public Law 784, Chapter 668, 77th Congress, 2d Session (56 Stat. 1028, 1033)	22
Public Law 493, Chapter 598, 78th Congress, 2d Session (58 Stat. 811)	22
Roberts' Report, Senate Document 159, 77th Congress, Second Session	23

PAGE

Report of the Naval Board of Inquiry 23
Report of the Committee for Investigation of the Pearl Harbor Attack, Senate Document 244, 79th Congress, Second Session 23
"Navy and the War" published by the Office of Public Relations, Naval Department (S. Doc. 107, 78th Cong., 1st Sess.) 23
International Law Digest, Volume 7, page 153 by John Bassett Moore..... 25
Corpus Juris, Vol. 67, p. 336..... 24

Supreme Court of the United States
OCTOBER TERM, 1946

No.

LOUISE C. BENNION,
Petitioner,
v.
NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT NEW YORK LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement

This is an action by the beneficiary of a life insurance policy to recover the sum of $10,000 allegedly due under the "Double Indemnity" provision thereof.

A. The Policy.

The policy in question was issued in the State of Virginia in 1925 by the respondent, New York Life Insurance Company to Commander Mervyn S. Bennion, U. S. Navy. Concededly, it is a Virginia contract. Under the terms of the policy the Company agreed to pay to the beneficiary the sum of $10,000 upon receipt of due proof of the death of the insured or the sum of $20,000 if death resulted from external, violent and accidental means as defined in the policy. It was specifically provided, however, that the double indemnity provision would be inapplicable, if the insured's death resulted, among other things, "from military or naval

service in time of war'' or ''from war or any act incident thereto''.

The annual premium paid by the insured for both the $10,000 face amount of the policy and the $10,000 double indemnity benefit totaled $351.70. Of this amount, only $20.00 was for the double indemnity coverage.

The normal premium for the double indemnity feature in any occupational classification which does not involve an extra accidental hazard would have been $10.00 per year for a policy of $10,000 face amount. However, in view of the insured's occupation as a naval officer, which occupation did involve an extra accidental hazard, the premium agreed upon was $20.00 per year. The additional premium did not in any degree alter the scope of the double indemnity coverage which provided that the double indemnity benefit would become payable only if the insured's death was caused by ''external, violent and accidental means'' and not if the death resulted ''from military or naval service in time of war'' or ''from war or any act incident thereto''.

B. Death of the Insured.

On December 7, 1941, the insured, who had in the interim been promoted to the rank of Captain, U. S. Navy, was in command of the *U. S. S. West Virginia*, then moored at Pearl Harbor, Territory of Hawaii. When the Japanese treacherously attacked our fleet on that fateful morning, Captain Bennion carried out his duty to defend his ship and while so engaged was struck fatally with shrapnel from a bomb dropped by a Japanese airplane. He died about an hour after having sustained his wound.

The petitioner's brief (p. 4) contains the statement that on December 7, 1941, the *U. S. S. West Virginia*, of which the insured was commanding officer, was anchored at Pearl Harbor ''under peacetime holiday routine, and was clearly not engaged in combat or war.'' As a matter of fact, the ships of the fleet at Pearl Harbor were, and for many days prior to December 7, 1941, had been alerted for war. The evidence in this case, according to the testimony of wit-

nesses for both the petitioner and the respondent, agree that at the time Captain Bennion was struck by the bomb fragment, the attack had been going on for some time and that Captain Bennion was at his post of duty.

C. Payment by the Company.

Upon receipt of the proofs of death, respondent promptly paid the face value of the policy in the amount of $10,000 and disclaimed liability for any double indemnity payment on the ground that the death of the insured had resulted "from military or naval service in time of war" or "from war or any act incident thereto" within the limitation expressly contained in the policy.

Prior Proceedings

A. State Court.

In July, 1945, the petitioner here commenced an action in a court of the State of Utah to recover the sum of $10,000 under the double-indemnity provision. It was also alleged in the complaint, in effect, that the respondent was estopped to deny its liability by reason of the Virginia incontestable Statute (Section 4228a, Virginia Code, 1924).

In petitioner's brief, no mention whatever is made of the Circuit Court's decision below holding the Virginia statute to be inapplicable. Therefore only brief reference to this point will be made hereinafter.

Respondent conceded that the policy was in full force and effect at the time of the death of the insured, but pleaded that the death under the circumstances alleged in the answer, resulted from war, or an act incident thereto, within the exception contained in the double indemnity provision.

B. United States District Court.

Upon petition of respondent, the suit was removed from the State Court to the United States District Court for

the District of Utah, upon the ground of diversity of citizenship of the parties. In November, 1945, the cause came on for trial before the Honorable Tillman D. Johnson. At the conclusion thereof, the Court directed the jury to return a verdict for plaintiff. Judge Johnson stated that the direction of the verdict was predicated upon his uncertainty as to whether the language in the policy "referred to and was intended to be interpreted as meaning war in the constitutional sense, or war as a matter of fact to be determined by a Court or a jury".

C. Circuit Court of Appeals.

Thereupon, respondent appealed to the Circuit Court of Appeals, Tenth Circuit, which reversed the judgment of the lower Court. Judge Murrah wrote the majority opinion, in which he was joined by Judge Broaddus, while Judge Huxman dissented in a separate opinion.

In finding for respondent, the majority held: (a) That the death of the insured had resulted from war or an act incident thereto, which had been excepted from the terms of coverage in the double indemnity clause of the policy; and (b) that the Virginia Statute did not preclude a denial of coverage by the respondent.

Thereafter, petitioner's application to the Circuit Court of Appeals for a rehearing was denied.

Respondent's Contentions

It is respondent's contention that the petition for a writ of certiorari herein should be denied on the following grounds:

I. None of the reasons set forth in Rule 38(5) or any other matters affecting public interest, are present in this case to warrant the granting of the writ.

II. In any event, the issues have been decided correctly by the Circuit Court of Appeals, Tenth Circuit.

POINT I.

There are no factors present in this case to warrant the granting of the writ.

The papers submitted in support of the petition amply demonstrate that the usual grounds for granting certiorari are wholly lacking in this case. Furthermore, no sufficient compelling necessity is advanced, either by way of general public interest in the matter or otherwise, which would serve to constrain the Court to exercise its discretion in favor of the petition.

A. The decision herein of the Circuit Court of Appeals, Tenth Circuit, is not in conflict with the decisions of any other Circuit Court.

Petitioner has failed to cite any decision in a Circuit Court which is in conflict with the decision of the Circuit Court of Appeals in this case. The statement made in petitioner's brief (p. 26) that the decision of the Circuit Court of Appeals, Tenth Circuit, in this case "is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit", is wholly contrary to fact. Petitioner has cited in support of that contention the case of *Savage* v. *Sun Life Assurance Co.*, 57 Fed. Supp. 620.

The facts are that the Sun Life Assurance Co. did appeal to the Circuit Court of Appeals, Fifth Circuit, from the decision of the District Court in plaintiff's favor, but that the appeal was dismissed on *appellant's motion* because the controversy had been compromised by the parties thereto and the appeal had become academic.

To avoid any doubt in the matter we have annexed hereto, marked Exhibit A, a certificate dated March 25, 1947, of Oakley F. Dodd, Clerk of the Circuit Court of Appeals, Fifth Circuit, showing that the appeal was dismissed on appellant's motion after settlement of the claim and that "this case was never submitted to the Court upon the transcript of record, and no other judgment was entered

in the case except the judgment of dismissal". There can be no question whatever that the judgment of the Circuit Court of Appeals, Fifth Circuit, in that case was not upon the merits. Petitioner's argument, therefore, must be disregarded in its entirety.

Furthermore, since the questions involved herein relate solely to State Law, any conflict which might exist between Circuit Courts of Appeal would not, in and of itself, be a sufficient basis for granting certiorari. *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206; 82 L. Ed. 1290, 1292.

B. The Circuit Court of Appeals, Tenth Circuit, has not decided an important question of local law herein in any way probably in conflict with applicable local decisions.

In so far as the interpretation to be placed upon the words "war or any act incident thereto" is concerned, respondent's research has failed to unearth any decisions of the Courts of the States of Utah or Virginia in conflict with the holding of the Circuit Court of Appeals in this case and none have been advanced by petitioner.

The petitioner intimates (Brf. p. 21) that the decision of the Circuit Court of Appeals below is probably in conflict with the decisions of the courts of the State of Utah. The case of *Browning* v. *Equitable Life Assurance Soc.*, 94 Utah 532, 543, 72 Pac. (2d) 1060, is cited as authority therefor.

Petitioner would have this court believe from that case that the courts of Utah have adopted the policy of "construing language [used in an insurance policy] to mean something which by its very terms it did not mean". On the contrary, the correct rule appears in the more recent Utah case of *Gressler* v. *New York Life Insurance Company*, 163 Pac. (2d) 324. There it was stated by a unanimous court (p. 330):

> "We see no reason for making identical language or identical import of language mean one thing in insurance contracts and something different in other contracts unless the content of those other contracts invests the language with a different meaning or intent. Insurance companies should not be the orphan litigants of the courts."

Had the policy here been one which for a nominal premium had provided coverage in the event the death of the insured resulted from "war or any act incident thereto" and no other risk, could we imagine any court holding that Captain Bennion did *not* die as a result of war?

We believe it to be beyond controversy, however, that the policy having been issued in Virginia, the laws of that state are controlling. *United States Mutual Accident Association* v. *Newman,* 84 Va. 52, 3 S. E. 805; *Darden* v. *North American Benefit Association,* 170 Va. 479, 197 S. E. 413. Accord; *Gressler* v. *New York Life Insurance Co.,* 156 P. 2d 212 (Utah; not officially reported).

In any event, the majority of the Circuit Court of Appeals, in deciding this case below, has applied rules of construction which are applied to insurance policies by the courts of both Virginia and Utah. *U. S. Mutual Accident Insurance Company* vs. *Newman,* 84 Va. 52, 3 S. E. 805. *Anderson* vs. *Great Eastern Casualty Company,* 51 Utah 78, 168 Pac. 966.

The same rules are applied in the Federal courts, where not controlled by local law. *Imperial Fire Insurance Company* vs. *Coos County,* 151 U. S. 452, 38 L. Ed. 231; *Bergholm* vs. *Peoria Life Insurance Company,* 284 U. S. 489, 76 L. Ed. 416; *Williams* vs. *Union Central Life Insurance Company,* 291 U. S. 170, 78 L. Ed. 711.

C. No important question of Federal Law is involved in this case.

The issues in this case are contractual in nature, having arisen solely by reason of the policy of insurance. It is evident that there are no Constitutional questions involved, nor are there any problems remotely relating to Federal Statutes or Regulations promulgated thereunder. The case involves simply the construction of an insurance contract delivered in Virginia upon which suit was brought in Utah.

Petitioner's brief (p. 22) contains the assertion that the Circuit Court of Appeals below had decided an important question of Federal law.

In the complaint, however, it was alleged that the policy was covered by Virginia law and that the Virginia incontestable statute precluded the defense of non coverage. The fact that the policy was a Virginia contract and that Virginia law would govern its interpretation in the courts of Utah was admitted by respondent and never contested. The case was tried and argued before the Circuit Court of Appeals upon that basis. The mere fact that the petitioner contends that under the Constitution, the United States cannot be said to be at war until Congress has so declared, does not necessarily inject a federal question of substance or importance. Neither the Circuit Court of Appeals nor the District Court decided such a question. All that either decided was the meaning of the word "war" as used in this policy, and in so deciding, both courts, the Circuit Court expressly and the District Court impliedly, applied the Virginia law.

Petitioner attempts to limit the interpretation of the word "war" to a state of war when declared by the Congress of the United States and in this case to a state of war between the United States and the government of Japan, thereby eliminating without further demonstration the question of whether a death could result from a war in which the United States was not one of the belligerents or a war carried on by another country regardless of any declaration by Congress.

The policy here did not limit the use of the word "war" to a war in which the United States was engaged as a belligerent, nor even to a war in which the insured was a belligerent participant. Had Captain Bennion been killed by a German shell while acting as a neutral military or naval observer of the conflict between Germany and Poland in 1939, he still would have died as a result of war or of an act incident thereto, although by no stretch of the imagination could it have been said that the United States was at war at that time. Had he, as did many other Americans, enlisted and served in the Royal Canadian Air Force and been killed in action in Europe prior to December 7, 1941 while so serving, he would clearly have died as a result

of war regardless of the fact that the United States was not at war at the time. The fact of the matter is that whether or not the United States was at war is really immaterial. Japan was at war with the United States and Captain Bennion's death was a result of that war or of an act incident to it. The Circuit Court held, applying rules of construction recognized and applied in similar cases by the courts of Virginia, that the death under the circumstances was within the exception of the double indemnity provision of the policy.

But even if it could be said that a question of federal law has been decided, the decision was not probably in conflict with the decisions of this court but to the contrary, as shown below, is in accord with those decisions.

D. The Circuit Court of Appeals, Tenth Circuit, has neither departed from the accepted and usual course of judicial procedure nor sanctioned any such departure by the District Court herein.

Petitioner has made no complaint herein with respect to the procedure followed either by the Circuit Court of Appeals or the District Court in this case. The petition is predicated solely upon the contention that the decision of the Circuit Court of Appeals is erroneous.

POINT II.

The Circuit Court of Appeals correctly decided the issues in this case in favor of respondent.

In its broad aspect, the controversy in this case revolves about the construction to be placed upon the phrases "from military or naval service in time of war" or "from war or any act incident thereto" which excluded death of the insured from such causes from the double indemnity benefits of the policy. More precisely, the question is whether or not Captain Bennion's death resulted from "military or naval service in time of war" or "from war or any act incident thereto". In the final analysis, this in turn, reduces

itself to the question of whether the Japanese attack on Pearl Harbor on December 7, 1941, was "war" within the meaning of the phrases employed in the policy of insurance. The Circuit Court of Appeals correctly decided that question in the affirmative. It is submitted that the decision is amply sustained by the record.

In petitioner's brief (p. 14), it is contended that respondent has construed the word "war" as meaning in effect a "state of war". Furthermore, that by alleging in its answer that at the time of the death of Captain Bennion a state of war existed between the United States and Japan, it had thereby estopped itself to deny that war in fact existed or anything other than that condition which exists *after* the formal declaration by Congress. Respondent, of course, has neither so construed the policy nor restricted itself in its defenses as petitioner claims. It pleaded the facts, and has at all times contended that under these facts, the death of the insured occurred under circumstances which relieved it of liability under the double-indemnity provision. As demonstrated hereinafter, whether the phrases used in the policy, refer to *war de facto* or to *a state of war*, the death of the insured was within the exception of the policy.

A. The attack upon Pearl Harbor was "war" within the plain meaning of the policy.

1. *The contract must be construed fairly, reasonably and in accord with common sense.*

At the outset, it should be noted that it is the general rule that the terms of a policy of insurance, which are free from ambiguity must be construed in their ordinary sense. This is the rule in the Federal Courts.

Imperial Fire Insurance Co. v. *Coos County,* 151 U. S. 452, 462, 38 L. Ed. 231, 235;

Bergholm v. *Peoria Life Insurance Co.,* 284 U. S. 489, 76 L. Ed. 416;

Williams v. *Union Central Life Insurance Co.,* 291 U. S. 170, 78 L. Ed. 711.

It is also the settled law of Virginia.

United States Mutual Accident Ass'n v. *Newman,* 84 Va. 52, 3 S. E. 805;
Welborn v. *Wyatt,* 175 Va. 163, 7 S. E. 2d 99;
Darden v. *North American Benefit Association,* 170 Va. 479, 197 S. E. 413.

The rule in Virginia is stated in *United States Mutual Accident Association* vs. *Newman, supra,* as follows:

> "The principles upon which contracts of insurance are to be construed are well understood in the profession and have been clearly laid down in this and other appellate tribunals, and are to be found in all the text writers. The principles applicable to them are the same as those which obtain in the construction of other contracts. The same rule of construction which applies to other instruments applies to these also. They are to be construed according to the sense and the meaning of the terms used; their terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade, acquired a peculiar sense, distinct from the popular sense, rendering it necessary to resort to extrinsic proof in order to determine in which sense they are used, and so to explain their ambiguity, or unless the context evidently points out that they must in the peculiar instance, and in order to effectuate the immediate intention of the parties be understood in some special and peculiar sense. * * * It is a contract and is to be governed by the same principles as govern other contracts. Its language is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded. Full legal effect should always be given to it, for the purpose of guarding the company against fraud and imposture. Beyond this, we would be sacrificing substance for form following words rather than ideas. * * * And in a case where it can fairly be claimed that two constructions can be placed upon the language used in the policy, it is now well settled that the one is to be adopted which is most favorable to the insured, and, in case of doubt as to the meaning

> of terms employed by an insurance company, they are to be construed most strongly against the insurer. * * * The language of a policy is to be construed according to its natural meaning, its ordinary and usual signification, except when such a construction would render the words used senseless, or it is evident from the general scope and intent of the instrument that the words were used in some other sense."

In *Dole* v. *New England Mutual Marine Insurance Co.*, 6 Allen 373 (Mass.) the rule has been stated as follows:

> "Nor can it [the rule of resolving ambiguities in favor of the insured] be properly used to warrant an interpretation which would tend to restrict words or phrases of a general import or signification which is well understood and established. If, for example, a term is used in a contract of insurance of a general nature, comprehending within its fixed and settled definition several different meanings each of which is germane to the subject matter of the contract and descriptive of transactions which might arise or occur in the course of the maritime adventures covered by the policy, it would not be consistent with any just rule of exposition to construe such term in a narrow and restricted sense so as to include one class of its proper definition and exclude all others. There would in such case be no doubt or ambiguity in the language used and it would be necessary so to construe it as to give full effect to the term used to the extent to which it was applicable to the subject matter of the contract. No inference could arise that it was intended by the parties to be used in one sense rather than another or that it was not designed to embrace every event or circumstance which in the practical operation of the contract might fairly be included within its meaning."

Furthermore, this principle has been applied to provisions in insurance policies of a type such as the one involved in this litigation, viz. those which limit the liability of the insurer. *U. S. F. & G. Company* v. *Guenther*, 281 U. S. 34, 37; 74 L. Ed. 683, 685; *Maryland Casualty Co.* v. *Morrison*, 151 Fed. 2d 772 (C. C. A. 10th).

2. *The term "war" is unambiguous.*

In petitioner's brief (p. 9), it is conceded that the phrase used is neither doubtful nor ambiguous; but it is contended, that under the law of Virginia, it would be held that war, as used in the policy, did not exist prior to the joint resolution of December 8, 1941.

The case of *Portsmouth Insurance Company* v. *Reynolds,* 32 Gratt. 613 (Va. 1880), cited by petitioner (p. 12), does not support this conclusion. In that case, the Union forces had set fire to certain material that seemed likely to fall into the hands of rebels. The policy under consideration excepted from coverage losses happening "by means of invasion, riot or civil commotion, or of any military or usurped power." The court held that the phrase, "military or usurped power," had an accepted meaning in insurance parlance of describing a military organization hostile to lawful government. Under the facts of the case, the court held that at the time of the loss, the Federal Government was not a hostile power, nor Virginia a usurped power; that there was no organized military force of Virginia at the time and no attack by rebel forces. In other words, there was "no conflict between the armed forces of two nations under authority of their respective governments", and therefore no war. The clear implication of this decision is that if the loss had occurred as the result of an attack by the armed forces of a hostile (foreign or usurped) power, the exception in the policy would have applied.

But petitioner argues that, if the words "war or any act incident thereto" are extended to contemplate or to include a state of affairs existing prior to a formal declaration by Congress, then it becomes vague, doubtful, and ambiguous, and therefore must be construed most favorably to petitioner and against respondent.

In the policy in question the word "war" is not limited or restricted by any qualifying adjective or phrase. Nor is there anything in the context of the policy that tends to limit the meaning of the word to any one of the many kinds

of war which are included within the general term. There is nothing to signify that either of the parties meant to include only a declared war, and not an undeclared war. Both types of war are included within the term. Nor is there anything in the context to indicate that the parties meant only that condition of international relationships which exist after but not before a formal declaration of such status or formal declaration of war.

If the parties had intended to limit the term to "declared war", or to a "state of war" or to "war formally declared by the solemn act of two or more sovereigns acting in accordance with international law and their respective constitutions", they could have said so. But the fact that the general word "war" includes within the plain, ordinary and popular sense of the term, several different types of war, does not render the term "ambiguous". To say that it can include "imperfect war" is not to say that it cannot include "perfect or solemn war" as those terms were used by Mr. Justice Washington in *Bas* v. *Tingy,* 4 Dallas 37, 1 L. Ed. 731. If the use of a word of general meaning is held to be ambiguous because it includes several classes, types or degrees, all susceptible of special designation, but all included within the general description, then indeed there is no certainty of expression.

In direct support of respondent's position is the case of *Stankus* v. *New York Life Insurance Company,* 312 Mass. 366; 44 N. E. 2d 687, in which the identical words in question in this case were construed. There, Judge Ronan held that the death of a sailor aboard the *U. S. S. Reuben James* on October 30, 1940, as the result of an attack by a German submarine, occurred in time of foreign war. In the course of its opinion, the Court said:

> "The term 'war' is not limited, restricted or modified by anything appearing in the policy. It refers to no particular type or kind of war, but applies in general to every situation that ordinary people would commonly regard as war. There is nothing in the policy that indicates that the word was

> used in any vague, indefinite or ambiguous sense. A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms."

In *U. S. F. & G. Company* v. *Guenther, supra,* this Court had before it for construction the phrase, "the age limit fixed by law," as used in the exclusion clause of an automobile liability policy. On that occasion the Court said:

> "The plain and evident purpose of the clause was to prevent the company from being held liable for any accident occurring by reason of the age of the driver. The automobile was being operated in violation of law. To that end, liability was excluded when the operator was 'under the age limit fixed by law'.
>
> "This is not limited to the case where the age limit is fixed by 'a law,' a specific phrase frequently limited in a technical sense to a statute, which, to say the least, would have involved doubt as to whether a municipal ordinance was included. On the contrary, the clause uses the broad phrase, 'fixed by law,' in which the term 'law' is used in a general sense as meaning the rules of action or conduct duly prescribed by controlling authority, including valid municipal ordinances as well as statutes. * * * We find no ambiguity in the phrase, 'under the age limit fixed by law,' contained in the exclusion clause of the policy, and think that, by reason of the ordinance, liability on the part of the company is precluded."

The generally accepted definition of the word "war" clearly is not restricted to a "declared" type. In *Funk & Wagnalls New Standard Dictionary,* it is defined as

> "A contest, as between nations or states, or between different parties in the same state, carried on by force and with arms, commonly either for defense or for avenging insults and redressing wrongs, for the extension of commerce and acquisition of territory, or to obtain and establish the superiority and dominion of one of the belligerents over the other; also the condition of things created by such a contest."

Similarly, in *Murray's Oxford Dictionary,* war is defined as:

> "A hostile contention by means of armed forces carried on between nations, states or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power or against an opposing power in a state."

Such definitions find further support in the case of *Bas* v. *Tingy,* 4 Dall 37, 1 L. Ed. 731, in which Justice Washington said: "every contention by force, between two nations, in external matters, under authority of their respective governments is not only war, but public war."

In *Luther* v. *Borden,* 7 How. 1, 45, Chief Justice Taney had described the disorders existing in Rhode Island in 1841 as being "a state of war". In the *Prize* cases (2 Black 635) Mr. Justice Nelson referred to this remark in the following words (p. 699): "But it is only necessary to say that the term "war" must necessarily have been used here by the Chief Justice in its popular sense * * *".

The dissenting judge in the Circuit Court of Appeals herein is unfortunate in his illustrations which were designed to show a contrast to the Pearl Harbor attack and to support the contention of ambiguity. He claims that the bombardment of Vera Cruz, the Pershing Expedition, the Panay Incident and the attacks by the Russians and the Japanese upon each other in Manchuria indicated that it is doubtful whether or not a particular case constitutes war. To these illustrations, petitioner has added the recent attacks by Yugoslav fliers upon our aircraft. It is submitted, however, that these illustrations do not make the term "war" ambiguous or detract from the fact that the Pearl Harbor attack began the war and created a state of war.

While it would seem that Quincy Wright in his study *"The Control of Foreign Relations"* stated that the Vera Cruz attack in which 300 persons were killed, was not "war" because the United States did not so intend, nevertheless, it is a fact that John Bassett Moore, in presenting to him

the prize of the American Philosophical Society, derided this misconception and pointed out clearly that the Vera Cruz attack was war. Mr. Moore said:

> "In reality the word 'war' comprehends two meanings. It denotes (1) acts of war, and (2) the international condition of things called a 'state of war.' Acts of war do not always or necessarily develop into the general international condition of things called a state of war, but they are never-the-less war and involve the 'making' of war in a legal sense. The fact is notorious that in many instances hostilities or war de facto have long preceded the formal declaration of war, and that when the declaration was made it was regarded as relating back to the time when hostilities began. As was shown by Lieutenant Colonel Maurice, of the British War Office, in his Hostilities Without Declaration of War, published in London in 1883, there were less than ten clear instances in the hundred and seventy-one years from 1700 to 1870, inclusive, where a declaration of war preceded hostilities or the actual making of war. This served to kill the project then pending for the building of a tunnel under the English Channel between Great Britain and France * * *.
>
> "I will take the specific case which the author of the essay mentions of the capture and occupation of Vera Cruz in April, 1914, by the forces of the United States. The author discusses the question whether this was to be considered as an act of war or as 'making war.' Sometimes it is helpful to visualize a question by bringing it home to ourselves. Let us suppose that some foreign power, for instance, Great Britain, or France, or Germany, feeling dissatisfied with the form of apology tendered by us for a temporary interference the week before with the movements of one of its consular or naval officers in the United States, should by military force attack and seize the port and city of Philadelphia, take control of Broad Street station and the Pennsylvania railroad, set up a military administration at the City Hall, and, using as a seat of customs the historic edifice [Independence Hall] in which we are now assembled, proceed to collect national duties and local revenues. How would this strike us? Should we

gently dream that the power committing these acts of hostility was exemplifying the arts and processes of peace? In reality an affirmative answer would confound all our conceptions, moral as well as legal. Such acts would necessarily strike a Frenchman, a German, a Japanese, a Mexican, or any other human being, lawyer or layman, learned or unlearned, at home, in the same way, as acts of war, and he would not be wrong. The Greytown incident, which has often been cited to prove that such a proceeding would not be war or an act of war, can not properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground. It should also be superfluous to remark that the fact that the government of the United States, although it had continued to maintain diplomatic intercourse with the Huerta government, had not formally recognized it, is altogether irrelevant. One nation can not divest another of its rights and immunities as an independent state by withholding formal recognition from its government." (*John Bassett Moore, Collected Papers,* Vol. V, p. 195).

3. *The Defense Against the Japanese Attack was authorized by the Government of the United States.*

It is contended in petitioner's brief (p. 12) that the conflict initiated by the Japanese attack was not war because Captain Bennion was killed before our government knew of the attack, and before it had authorized resistance.

The fact that the attack was made by authority of the Japanese government can not be questioned; that the resistance made by the American forces had been previously authorized and ordered by the United States is equally clear.

The possibility of the attack had long been anticipated by the United States. On November 24, 1941, the Chief of Naval Operations, Admiral Stark, had sent to Admiral Kimmel, then in charge of the Pacific fleet stationed at Pearl

Harbor, a message reading as follows: (Record p. 26) "A surprise, aggressive movement [by Japanese naval and military forces] in any direction, including an attack on the Philippines or Guam, is a possibility".

On November 27, 1941, Admiral Stark sent a message to Admiral Kimmel (Record p. 26) saying: "Consider this dispatch a war warning * * * Japan is expected to make an aggressive move within the next few days * * * you will execute a defensive deployment in preparation for carrying out the tasks assigned in WPL 56 only."

On the same day, the Chief of Staff (Army) radioed the commanding general in Hawaii (Record p. 27) "* * * Japanese future actions unpredictable, but hostile action possible at any moment. If hostilities can not, repeat can not, be avoided, the U. S. desires that Japan commit the first overt act. This policy should not, repeat not, be construed as restricting you to a course of action that might jeopardize your defense * * * should hostilities occur, you will carry out task assigned in Rainbow 5 as far as they pertain to Japan * * *."

Rainbow 5 war plans presupposed the existence of war (Record p. 27).

The final warning to be on the alert for an attack on Pearl Harbor was dispatched from Washington on the morning of December 7, Washington time, after the Japanese note had been decoded, but before the attack. This was the message which was not delivered in Hawaii until after the attack. (See Report of Naval Court of Inquiry, Exhibit B, p. 138).

In view of these warnings and instructions from Washington, it is difficult to understand petitioner's contention that the armed resistance to the Japanese attack made by the U. S. S. West Virginia under the direction and command of the insured was not by authority of his Government. It is likewise difficult to believe that the petitioner is sincere in contending (Brf. p. 25) that the fleet was not repelling invasion and that Captain Bennion was not engaged in combat or war when he was killed.

4. *The Political Department of our Government has determined that Pearl Harbor was "war".*

In petitioner's brief (p. 24) the contention is made that the Court can not take notice of the existence of war until there has been a declaration and determination thereof by the political department of the Government. We submit that such a contention implies that our courts must be blind to the facts of history, and affect a technical ignorance of the opening battle of the greatest war in which this country has ever been engaged.

In any event, respondent urges that there is ample evidence in this case, of which the court may take judicial notice, that the political department of this Government had determined that a Japanese attack would initiate war, and had determined prior to the joint resolution of Congress that the attack did initiate war.

On many occasions prior to the actual attack on Pearl Harbor, the President had indicated that we not only would repel aggression or invasion, but that the United States was prepared to do so and that such an invasion or aggression would mean war. On July 10, 1940 (Public Papers for 1940, p. 228), while promising peace, he had said: "We will repel aggression against the United States". The Democratic Platform of July 17, 1940, had promised peace, "except in case of attack". (New York Times, July 18, 1940). At Dayton, on October 12, 1940, during the campaign, President Roosevelt had stated (Public Papers for 1940, p. 464): "We are building a total defense * * * sufficient to repel attack from any part of the world." On November 2, 1940, at Rochester, he stated (Public Papers for 1940, p. 540) that our policy was "to repel assailants". The attack on Pearl Harbor was exactly the type of assault which was foreseen in these declarations of policy and which would cause war.

The attack on Pearl Harbor occurred on Sunday, December 7th, 1941 at 1:20 P. M. Washington time. On the same day, as soon as possible after receiving news of the attack, the President issued a proclamation (Proc. #2525, Fed.

Register, Dec. 10, 1941, p. 6321, see also 55 Stat. Pt. II, p. 1700) under the Alien Enemy Act (Sec. 21, Title 50 U. S. C. A.) proclaiming that "an invasion has been perpetrated upon the territory of the United States" and declaring that Japanese nationals were "alien enemies".

On the following day, the President addressed the Congress and after reciting the Japanese attacks on Pearl Harbor and elsewhere said:

> "The facts of yesterday speak for themselves. * * * As Commander in Chief of the Army and Navy, I have directed that all measures be taken for our defense. * * * Hostilities exist.". He then asked that the Congress declare that "since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire." (Congressional Record, Vols. 87, Part 9, pp. 9504-05.) (R., p. 16.)

Congress acted in conformity with the President's request and declared:

> "Whereas the Imperial Government of Japan has Committed unprovoked acts of war against the Government and people of the United States of America;
>
> "Therefore be it Resolved, etc. that
>
> "The state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared * * *." (Public Law 328, 77th Cong., 1st Session.) (R., p. 31.)

A fair reading of this declaration indicates beyond any reasonable doubt that it was declaratory of a pre-existing state of facts and in no way constitutive of a new state of facts. As the members of Congress had said in the debate before the adoption of the resolution, excerpts from which are quoted in Appendix A in the brief of this respondent in the Circuit Court of Appeals, war existed and the resolution was merely a formal recognition of that fact.

It should be noted also that the Supreme Court in *Duncan* v. *Kahanamoku*, 327 U. S. 304, has declared in effect

that the Pearl Harbor attack made Hawaii a "white hot center of war".

In many acts passed subsequent to the Joint Resolution of December 8th, Congress has recognized the fact that the war with Japan began with the Pearl Harbor attack. For example, as late as February, 1944 Congress passed the Mustering Out Payment Act of 1944 (58 Stat. 8) which provided in part as follows:

> "* * * each member of the armed forces who shall have been engaged in active service in the *present war* and who is discharged or relieved from active service under honorable conditions on or after December 7, 1941 shall be eligible for mustering out payments." (Italics supplied.)

In numerous other acts Congress has officially included December 7, 1941 as within the period of the "present war".

Public Law 144, Chapter 233, 78th Congress, 1st Session (57 Stat. 556);

Public Law 10, Chapter 16, 78th Congress, 1st Session (57 Stat. 21);

Public Law 16, Chapter 22, 78th Congress, 1st Session (57 Stat. 43);

Public Law 52, Chapter 96, 78th Congress, 1st Session (57 Stat. 81);

Public Law 767, Chapter 633, 77th Congress, 2d Session (56 Stat. 1012);

Public Law 784, Chapter 668, 77th Congress, 2d Session (56 Stat. 1028, 1033);

Public Law 493, Chapter 598, 78th Congress, 2d Session (58 Stat. 811).

We have heretofore referred to and quoted from the official documents and messages from the Chief of Staff and the Chief of Naval Operations to their respective commanders in the Pacific warning them of the probability

of a surprise attack, and ordering defensive measures against it. These excerpts, and others which abound in the records of the several official investigations made into the cause and responsibility for the disaster at Pearl Harbor, clearly show that the State, War, and Navy departments had determined that the expected attack would initiate war. Other illustrations are found in the same reports and in other official documents to the effect that the political department determined that the attack on Pearl Harbor did begin the war. Roberts' Report, Senate Document 159, 77th Congress, Second Session (Exhibit A, Record, p. 23). Report of the Naval Board of Inquiry (Exhibit B, Record, p. 22). Report of the Committee for Investigation of the Pearl Harbor Attack, Senate Document 244, 79th Congress, Second Session.

Both the Army report and that of the Naval Board of Inquiry demonstrated that the attack of December 7, 1941 was regarded as "ushering in", "initiating", "starting", "precipitating", "commencing" and "inaugurating" a state of war.

Further substantiation is found in the report on the "Navy and the War" published by the Office of Public Relations, Naval Department (S. Doc. 107, 78th Cong., 1st Sess.). We find the following expressions: "Events in the war which began on Sunday, December 7, 1941" (p. 1); "In a flash the attack on Pearl Harbor had settled all that, and the war was on" (p. 3).

In addition to the many additional evidences that the executive department of the government recognized that a state of war would be created by a hostile attack by Japan and that it did so result immediately upon the attack (cited in Appendix I of Respondent's Brief below) there is the testimony of Admiral Nimitz given by affidavit in the war crimes trial of Admiral Doenitz at Nurnberg to the effect that "unrestricted submarine and air warfare" upon Japanese merchantmen was ordered by the Chief of Naval Operations (Admiral Stark) on December 7, 1941.

All these are conclusive that prior to the Resolution the political department of the government had determined that

an attack would and that the attack on Pearl Harbor did precipitate and initiate a "state of war". The contention of those cases which hold that before it can be said that a condition of war exists there must be "some determination by the political department evidencing the existence of such a condition" is thus satisfied.

United States v. *One Hundred Twenty Nine Packages,* 27 Fed. Cas. No. 15941;
Sutton v. *Tiller,* 6 Cold (Tenn.) 593, 98 Am. Dec. 471;
Hamilton v. *McClaughry* (C. C. Kans.), 136 Fed. 445, 449;
In re Wulzen (E. D. Ohio), 235 Fed. 362, 365;
Verano v. *de Angelis Coal Co.* (M. D. Pa.), 41 Fed. Supp. 954;
67 Corpus Juris, p. 336.

5. *The Japanese Government declared that war had begun at dawn on December 7, 1941.*

At 4:00 P. M. on December 7, 1941 (Washington time), less than three hours after the commencement of the attack on Pearl Harbor, Japanese Military Headquarters announced that "War with the United States began as of dawn that day" (Record, p. 30). At 9:00 P. M. on that date (Washington time), there was delivered to Ambassador Grew in Tokio a communication from the Japanese Foreign Office informing the Ambassador that "there has arisen a state of war between your Excellency's country and Japan beginning today" (Record, p. 31). This is still another indication that Japan was at war with the United States at the time of Captain Bennion's death.

B. War may exist without a formal declaration thereof.

1. *A declaration of war by Congress is unnecessary.*

It is not an absolute condition precedent to war by the United States that Congress shall have made a formal declaration thereof. It seems self-evident that the United

be at war as the result of an attack upon our
States may l citizens by a foreign power, especially where
territory an s of the magnitude present at Pearl Harbor,
the attack action whatever having been taken by Congress.
without any nces, the President of the United States is duty
In such inst e our forces resist the onslaught of the enemy.
bound to ha ated in the *Prize* cases (2 Black 635) in which
This is indi (p. 688):
it was said f a war is made by invasion of a foreign nation,

> "resident is not only authorized but bound to
> the F force by force. He does not initiate the war,
> resist is bound to accept the challenge without wait-
> but h r any special legislative authority, and whether
> ing fostile party be a foreign invader or states organ-
> the h n rebellion, it is none the less a war, although
> ized eclaration of it be unilateral. * * * However
> the d nay have been its previous conception, it never-
> long is springs forth from the parent brain, a Min-
> thele in the full panoply of war. The President was
> erva l to meet it in the shape it presented itself,
> boun ut waiting for Congress to baptize it with a
> witho ; and no name given to it by him or them could
> name e the fact."
> chan

The foll owing quotation from the case of *Dole* v. *Mer-*
chants' Mut ual Marine Insurance Co., 51 Maine 465, 470, is
particularly apropos:

> "War is an existing fact and not a legislative
> decre e. Congress alone may have power to declare it
> befor ehand, and thus cause or commence it. But it
> may be initiated by other nations, or by traitors;
> and then it exists, whether there is any declaration
> of it or not. It may be prosecuted without any dec-
> laration; or congress may, as in the Mexican war,
> declare its previous existence. In either case it is
> the fact that makes 'enemies' and not any legislative
> Act."

Petitioner contends that a legal state of war can not exist prior to a declaration thereof by Congress, and cites and quotes in part a paragraph from John Bassett Moore's *International Law Digest*, Volume 7, Page 153. There is

omitted, however, from the quoted passage in petitioner's brief the sentences which follow and which clearly show that the author was referring to the technical *state of war,* as used in international law, which affects the rights and obligations of neutrals and dealings with belligerents. The full quotation is, with previously omitted portions in italics, as follows:

> "Much confusion may be avoided by bearing in mind the fact that by the term 'war' is meant not the mere employment of force, but the existence of the legal condition of things in which rights are, or may be prosecuted by force. Thus, if two nations declare war, one against the other, war exists, though no force whatever may, as yet, have been employed. On the other hand, force may be employed by one nation against the other, as in the case of reprisals, and yet no state of war may arise. *In such case, there may be said to be an act of war but no state of war. The distinction is of the first importance, since, from the moment when a state of war supervenes, third parties become subject to the performance of the duties of neutrality, as well as to all of the inconveniences that result from the exercise of belligerent rights. One of the most remarkable illustrations of the distinction here pointed out was the condition of things in China in 1919 when the armed forces of the allies marched to Peking and occupied parts of the country without any resultant state of war.*"

We would like to point out, however, that it has been held that a crime perpetrated by a member of the United States army during the occupation of China was committed in time of war under the articles of war. *Hamilton* vs. *McClaughry,* 136 Fed. 445.

In the same sub-chapter of *Moore's Digest,* which is entitled, "COMMENCEMENT OF WAR, the following illustrations are given:

> "President Polk in a message to Congress May 11, 1846 declared that American blood had been shed by the forces of Mexico on American soil, and that war existed by the act of Mexico. By an act of May 13, 1846, which recited that war existed by an act of

Mexico, provision was made for carrying on the conflict. Prior to the passage of the act of Congress, the battles of Palo Alto and Resaca de La Palma had been fought."

"War was formally declared by Japan on August 1, 1894, and the challenge was accepted in a counter-declaration issued by China on the following day. On July 25, the Japanese squadron had been engaged with Chinese men-of-war which had been convoying transports carrying reinforcements for Asan in Korea, and Japanese troops had captured Asan itself on the 29th. *A state of war existed therefore between the two countries as early as July 25, and there is nothing irregular in a war thus commenced.*" (Italics supplied.)

Judge Moore concludes his chapter on COMMENCEMENT OF WAR with his own comment:

"It is universally admitted that a formal declaration of war is not necessary to constitute a state of war. * * *if, for example, a nation wishing to absorb another or to seize a part of its territory, should, without warning or prior controversy, suddenly attack it, a state of war would undoubtedly follow."

There can be no question but that Japan intended its attack on Pearl Harbor to be a declaration of war. It is submitted that whether or not Congress formally recognized the existence of the war so declared, a state of war existed. It is impossible to conceive of one country being in a state of war with another without the other being in a state of war with the former. (See also the *Eliza Ann*, infra.)

2. *A State may be at war without any declaration by Congress.*

Under Art. I, Sec. 10, of the Constitution of the United States, "no State shall, without consent of Congress, * * * engage in war unless actually invaded, or in such imminent danger as will not admit of delay". Thus, a State may be compelled to engage in war by reason of invasion or from

imminent danger without any action whatever having been taken by Congress. This is another illustration of war without any formal declaration thereof by Congress.

3. *A formal declaration of war is the exception rather than the rule.*

Innumerable wars have been commenced and waged without any formal declaration. Japan is by no means a neophyte in that type of action. She commenced the Chino-Japanese War of 1894 by the occupation of Seoul a week before war was declared. She opened hostilities with Russia in 1904 with her attack on Port Arthur and the Russian fleet four days before she declared war. The Chinese "Incident" was fought as a full fledged war for four years before either belligerent formally declared war. It was, however, none the less "war" as was held in the case of *Kawasaki Kisen Kabushika Kaisya* v. *Bantham Steamship Co.,* 63 Lloyds List Law Reports 155 (1939) and as the Japanese Foreign Office admitted, perhaps inadvertently, in the 7th paragraph of the notorious note handed to Secretary Hull by the Japanese envoys on that fateful Sunday.

In our own history two battles at least, Palo Alto and Resaca de la Palma in the war of 1848 with Mexico, were fought before the declaration of war and in the case of the Mexican war of 1848 and the Spanish war of 1898 Congress expressly antedated the commencement of the war or state of war. See *Dole* v. *Merchants Mutual Marine Ins. Co., supra,* and *The Pedro,* 175 U. S. 354, 44 L. Ed. 195.

In *LaRue* v. *Kansas Mutual Life Ins. Co.,* 68 Kans. 539, 75 Pac. 494 it was held that a state of war existed in the Philippines during the insurrection after the treaty terminating the Spanish American war. Similarly in *Hamilton* v. *McClaughry,* 136 Fed. 445 it was held that a state of war existed at the time of the Boxer uprising in China. In neither case had there been a declaration of war by Congress.

In *Arce* v. *State,* 80 Tex. Crim. App. 331, 202 S. W. 951 the Texas Court held that the conditions existing along the

Mexican border in 1914-1915 were in fact a state of war although no declaration to that effect had been made by Congress.

In *Vanderbilt* v. *Travelers Life Ins. Co.*, 112 Misc. 248, 184 N. Y. Supp. 54 (affirmed 235 N. Y. 514, 139 N. E. 715) it was held that the death of an American citizen passenger on the Lusitania, sunk by a German submarine in 1915, resulted from "war" as used in the exclusion clause of a policy very similar to that involved in this case.

Finally, Respondent's contention finds support in the case of the *Eliza Ann*, 1 Dodson 244 at 247, in which Lord Stowell said:

> "* * * British ships were excluded from the ports of Sweden and the island of Hanoe was occupied by British forces. After this, a declaration of war was issued by the government of Sweden, but, it is said, that the two countries were not, in reality, in a state of war, because the declaration was unilateral only. I am however, perfectly clear that it was none the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations."

C. Decisions to the contrary are unsound.

Petitioner has cited the *Rosenau, Savage, Pang* and *West* cases which have held that only a declaration by the Congress could initiate war. In view of our discussion heretofore such a conclusion obviously is in error. War is a fact caused by hostilities.

The *Rosenau* (65 Idaho 408, 145 Pac. (2d) 227) and *Pang* (37 Hawaii 208) cases rested upon stipulations to the effect that there had been no "determination by the political department of the United States that a condition of war existed in which the United States was a participant", prior to the adoption by Congress of the joint resolution of December 8, 1941. In view of the numerous determinations made by the political department before the attack as well as those made on December 7th before the adoption of the

joint resolution, such stipulations are patently contrary to fact.

Furthermore, it is not correct that the declaration of war was "the first official action of the political department" (Petition for Rehearing by Circuit Court of Appeals, p. 5). It had been preceded by the determination of the President on December 7, 1941 in his proclamation declaring the Japanese to be enemy aliens and stating that the country had been invaded. It was preceded also, by the President's address to Congress which must have been prepared on December 7, 1941. In any event, the address is self-explanatory.

In the *Savage* case (57 Fed. Supp. 620) and in this case below, the Judges decided that war in fact existed on December 7, 1941 but did not draw the necessary conclusion that that was "war" within the meaning of the policy. These courts erroneously held that a legal state of war could not come into existence until Congress had recognized it. As we have shown above, this is contrary to all of the authorities except the four cases relied upon by the petitioner. In addition, in the *Savage* case, Judge Dawkins decided against the insurance company because, as he felt, the parties to the contract could not know when war began until Congress had so declared. We have no doubt that as soon as Captain Bennion saw that he was dealing with an air raid by Japanese forces, he knew that war was on.

The formal declaration of war by Congress on December 8, was not legally necessary. War in fact existed in every sense from the morning of December 7, 1941. It did, however, enable the prior hostilities to be more precisely characterized and served to unite the people.

The declaration by Japan two hours and 40 minutes after the attack upon us was also a mere formality. The language spoken by the Japanese bombs was understood by both sides and required no special interpretation or explanation. Indeed, no interpretation, other than war, was possible. That attack was the culmination of the failure of long negotiations in Washington. Its implications were clear.

D. *The Virginia Statute is not in point.*

In the Courts below petitioner had asserted that respondent was estopped to deny its liability under the double indemnity provisions of the contract by reason of the Virginia Statute referred to above. This contention is wholly without merit.

Respondent is not contesting the policy. On the contrary, it has affirmed the policy in its entirety. In this action its defense is predicated upon the very terms of the contract. Under those terms, respondent would not be liable under the double indemnity clause if the insured's death resulted "from military or naval service in time of war" or "war or any act incident thereto". Under the facts, the insured's death did result from such cause with the consequence that respondent was liable only for the face value of the policy which has been paid.

The Statute in question has been interpreted in accord with respondent's position herein. *Darden* v. *North American Benefit Association,* 170 Va. 479, 197 S. E. 413; *New England Mutual Life Insurance Co.* v. *Mitchell,* 118 Fed. (2d) 114 (C. C. A. 4th).

Conclusion

The policy in question provided specifically that the double indemnity benefits which are sought to be recovered in this action, would not accrue if the insured's death resulted either "from military or naval service in time of war" or "from war or any act incident thereto". The word "war" clearly was used in the contract in its generally accepted sense. It encompassed war of every type and kind and it applied to any situation that people would ordinarily regard as war.

To hold for petitioner this Court necessarily would have to interpolate the word "declared" before the word "war". This would distort the clear and unequivocal into the obscure and ambiguous and substitute fiction for fact. Such

a holding, in effect, would mean that Captain Bennion and the other thousands of brave men who gave their lives in defense of our country on December 7, 1941, at Pearl Harbor, did not die in World War II, but died as the result of a peacetime accident. The mere statement of that conclusion amply demonstrates its fallacious character. It would also be contrary to the innumerable pronouncements of the political departments of our Government, to which reference has heretofore been made.

On the basis of the foregoing, it is submitted that the petition for a writ of certiorari herein should be denied, because of the complete absence of any valid ground therefor, and, furthermore, because the issues in the case were decided correctly by the Circuit Court of Appeals, Tenth Circuit.

Respectfully submitted,

GEORGE A. CRITCHLOW,
Salt Lake City, Utah;

EDWIN BORCHARD,
New Haven, Conn.,
Attorneys for Respondent.

RONALD B. SWINFORD,
HARRY J. MCCALLION,
New York City,
Of Counsel.

EXHIBIT A.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11277

SUN LIFE ASSURANCE COMPANY OF CANADA

versus

MRS. THERIA DARBY SAVAGE

Motion to dismiss

Now into Court comes the SUN LIFE ASSURANCE COMPANY OF CANADA, appellant, and moves the Court to dismiss its appeal in this Court for the reason that the said matter has been compromised and settled.

(signed) RICHARD B. MONTGOMERY, JR.
Attorney for Appellant.
1105 Maritime Building

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11277.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Appellant,

versus

THERIA DARBY SAVAGE,
Appellee.

Appeal from the District Court of the Unted States for the Western District of Louisiana.

BEFORE HOLMES, MCCORD, and WALLER, Circuit Judges.

By the Court:—

ON CONSIDERATION of the motion filed by the Appellant, Sun Life Assurance Company of Canada, through Richard B. Montgomery, Jr., Esquire, counsel for said Appellant, to dismiss the appeal in the above entitled and numbered cause,

IT IS ORDERED by the Court that the appeal in said cause be, and it is hereby, dismissed, at the cost of said Appellant.

(ORIGINAL FILED APRIL 19, 1945.)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages, contain a true copy of the motion of appellant to dismiss its appeal, and judgment of dismissal in the case of

Sun Life Assurance Company of Canada,
Appellant,

No. 11277 *versus*

Theria Darby Savage,
Appellee,

as the same remains upon the files and records of said United States Circuit Court of Appeals.

I further certify that this case was never submitted to the Court upon the transcript of record, and no other judgment was entered in the case except the judgment of dismissal attached hereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 25th day of March, A. D. 1947.

(SEAL)

Oakley F. Dodd
Clerk, U. S. Circuit Court of Appeals for the Fifth Circuit.

(SEAL)